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No. 86-871

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE POTOMAC ELECTRIC POWER COMPANY,
Petitioner,

v.

STEPHEN H. SACHS, ATTORNEY GENERAL OF MARYLAND, AND ADELE WILZACK, SECRETARY OF THE MARYLAND DEPARTMENT OF HEALTH AND MENTAL HYGIENE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

E. BARRETT PRETTYMAN, JR.*
SHERWIN J. MARKMAN
JOHN C. KEENEY, JR.
DAVID J. HAYES
JOHN G. ROBERTS, JR.
HOGAN & HARTSON
(a partnership including professional corporations)
815 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 331-4685

ARNOLD M. WEINER
MICHAEL SCHATZOW
ETHAN L. BAUMAN
MELNICOVE, KAUFMAN, WEINER, SMOUSE & GARBIS, P.A.
36 South Charles Street
Baltimore, MD 21201
(301) 332-8525
Counsel for Petitioner

Of Counsel:
KATHLEEN B. DEWEESE
Associate General Counsel
POTOMAC ELECTRIC POWER COMPANY
1900 Pennsylvania Ave., N.W.
Washington, D.C. 20068
(202) 872-2520

* Counsel of Record

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REPLY BRIEF FOR PETITIONER

The State's brief in opposition ("Opp. Br.") simply confirms the need for this Court to grant the petition, vacate the judgment, and remand for such further proceedings as may be appropriate.[1] To the extent the State disagrees with PEPCO concerning the continuing viability of the present case, such disagreement demonstrates that the court below on remand, rather than this Court, should address such issues in the first instance.

In light of the State's decision to suspend its investigation of PEPCO, the only issue presented in the petition—the propriety of abstention in favor of a state

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[1] The statement required pursuant to Rule 28.1 appears in the petition at ii n.*.

grand jury investigation—has been rendered moot.[2] The entire case is not moot, however, since PEPCO's underlying preemption claim remains very much alive. The court below expressly recognized that it was able to avoid deciding PEPCO's preemption claim only because of its ruling on abstention. App. to Pet. at 14a. In such circumstances this Court routinely grants, vacates, and remands. *See, e.g., Honig* v. *Students of the California School for the Blind*, 471 U.S. 148 (1985); *Allen* v. *Ellisor*, 454 U.S. 807 (1981).

The State, for reasons that are not clear, seems anxious to avoid such a result. The State argues, for example, that this Court should deny the petition because a federal question has been lacking from the outset. Opp. Br. at 16-20. This argument was rejected by the court below, which held that "there is no merit to Maryland's argument that the district court lacked jurisdiction." App. to Pet. at 12a n.3. Significantly, the State did not file a cross-petition seeking a review of that determination. In any event, it is clear from this Court's recent decisions—cited by the court below—that a federal question is presented by PEPCO's preemption claim. *See Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) ("A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, * * * presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to re-

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[2] Though both parties recognize that this issue is moot, the State nonetheless devotes the bulk of its opposition to arguing the merits of the issue. Opp. Br. at 7-16. PEPCO's disagreement with the State's position on the merits is fully developed in the Petition. We need only add that the State implicitly concedes a conflict between the decision below and *Monaghan* v. *Deakins*, 798 F.2d 632 (3d Cir. 1986), pet. for cert. pending, No. 86-890; its only response is that *Monaghan* is "an anomaly." Opp. Br. at 15.

solve"); *Lawrence County* v. *Lead-Deadwood School District*, 469 U.S. 256, 259 n.6 (1985).

The State also contends that there is no longer a case or controversy between the parties. Opp. Br. at 22-24. As PEPCO explained in its supplemental brief, its preemption claim remains a live controversy ripe for adjudication. Supp. Br. at 3. Indeed, PEPCO detailed the facts presenting a case or controversy "[q]uite apart from [the] pending investigation" in its petition, Pet. at 4, which was of course filed *before* the State decided to suspend its investigation. The State does not dispute these facts but instead seems to rest its position on what it perceives to be PEPCO's real intent in filing the lawsuit. Opp. Br. at 22-23. Even if intent were controlling—which it is not—the record demonstrates that a multiplicity of reasons in addition to the potential indictment underlay the bringing of this lawsuit. Pet. at 4-5. PEPCO's claim in no way depended exclusively on the pendency of the State's investigation, and the suspension of that investigation does not remove the dispute between the parties.[3]

Since there is still a live case or controversy between the parties, and since PEPCO's preemption claim remains ripe for decision, the case should be remanded for further proceedings. Even if this Court were uncertain as to whether the case remains live, remand would still be the appropriate disposition so that the Court of Ap-

[3] The State contends that the propriety of abstention "is determined as of when proceedings of substance occur in the district court." Opp. Br. at 25. This statement is correct, but completely irrelevant to the question of the appropriate disposition of this case now that the abstention issue is moot. The entire point is that PEPCO disagrees with the decision of the court below concerning the propriety of abstention "as of when proceedings of substance occur[red] in the district court." Because the State suspended its investigation, PEPCO has been denied the opportunity for full review of that decision. The judgment should accordingly be vacated and the case remanded.

peals could consider the question in the first instance. The issue presented in PEPCO's petition for certiorari became moot through no fault of PEPCO's, but by the action of the State after PEPCO filed its petition. Under such circumstances the judgment must be vacated; PEPCO should not be "prejudiced by a decision which in the statutory scheme was only preliminary." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 40 (1950). The decision on abstention was preliminary, and a decision on preemption is now warranted.

For the foregoing reasons, and those in the Supplemental Brief, the petition should be granted, the judgment below vacated, and the case remanded for such further proceedings as may be appropriate.

Respectfully submitted,

E. BARRETT PRETTYMAN, JR.*
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